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IN THE

Supreme Court of the United States

October Term, 1967

No. 29

SANFORD ZWICKLER,

Appellant,

—against—

AARON E. KOOTA, as District Attorney of the County of Kings,

Appellee.

ON APPEAL TO THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK

BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AS *AMICUS CURIAE*, IN SUPPORT OF APPELLEE

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BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AS *AMICUS CURIAE*, IN SUPPORT OF APPELLEE

Introduction: Interest of *Amicus*

It would ill-suit the aims of our existence as an organization made up of prosecuting attorneys throughout the United States if we were not to make a sincere attempt to oppose those who, in their quest to denigrate laws proscribing conduct deemed inimical to the harmonious and fruitful exercise of governmental powers, fall back on the basic rights secured to us by our Nation's Founding Fathers in the Bill of Rights, and "pluck" from it the guarantee then most suitable for their purpose, and by its use, not as a shield, but as a weapon, indulge in a "war" to convince courts that a particular right of an individual transcends a free and orderly society.

It is respectfully urged that a law such as Section 781-b of the Penal Law of the State of New York, as so identified in the Record of this case, and now known as Section 457 of the Election Law of the State of New York,* is one of such vital significance, and so much a part of the proper exercise of the elective franchise, that any successful attack of it as violative of free expression, might have the disastrous consequence of demeaning the processes of our altruistically-operated democratic form of government. As a result, this society might become subject to constant changes, some perhaps perilous, brought about by an electorate in whose minds are instilled possible ill-conceived and unfounded thoughts, regarding election and political matters, cleverly-conveyed from sources concealed in anonymity.

At least 36 states have recognized the need for the type of statute involved (see *Talley* v. *California*, 362 U.S. 60, 70 [1960], *infra*), and, according to one jurist, who has advanced the thought that such a law "represents the view of both political parties [in the State of Pennsylvania]," also stated that ". . . even the judiciary is not so remote from the realities of political life that it cannot recognize it as *wholesome* and desirable legislation." (See *Commonwealth* v. *Evans*, 156 Pa. Super. 321, 325-27, 40 A. 2d 137, 138-39 [1945], *infra* [Reno, J.] [emphasis supplied].)

We, therefore, take the position that a statute such as the one now before this Court, is "wholesome," and is a reasonable restraint upon the exercise of free expression, so that a greater good can be accomplished. Consequently, since we feel that such a statute is not unconstitutional, we

* See pages 3-4, *infra*.

respectfully submit that the appellant's attempt to veer this Court from the path of sound principles of abstention and federalism, is without merit for the reasons hereinafter set forth by us as *Amicus Curiae*

The Statutes Involved

Section 781-b of the Penal Law of the State of New York provides as follows:*

> "Section 781-b. Printing or other reproduction of certain political literature.
>
> No person shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed by any method any handbill, pamphlet, circular, post card, placard or letter for another, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution, *whether in favor of or against* a political party, candidate, committee, person, proposition or amendment to the state constitution, in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution without also printing or reproducing thereon legibly and in the English language the name and post-office address of the printer thereof and of the person or committee at whose instance or request such hand-

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* By L. 1965, c. 1031, eff. September 1, 1967, this statute has been superceded by Section 457 of the Election Law of the State of New York, in which the identical language is employed. Since the appellant has referred to the prior section in his brief, *amicus* will continue to do likewise herein with the understanding that the references are applicable to the more recent enactment.

bill, pamphlet, circular, post card, placard or letter is so printed, published, reproduced or distributed, and of the person who ordered such printing, publishing, reproduction or distribution, and no person nor committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such handbill, pamphlet, circular, post card, placard or letter without also so printing, publishing, or reproducing his or its name and post-office address thereon. A violation of the provisions of this section shall constitutte a misdemeanor.

The term 'printer' as used in this section means the principal who or which by independent contractual relationship is responsible directly to the person or committee at whose instance or request a handbill, pamphlet, circular, post card, placard or letter is printed, published, reproduced or distributed by such principal, and does not include a person working for or employed by such a principal." (Emphasis supplied.)

Section 782 of the Penal Law of the State of New York provides as follows:*

"Section 782. Penalty.

Any person convicted of a misdemeanor under this article shall for a first offense be punished by imprisonment for not more than one year, or by a fine of not less than one hundred dollars nor more than five hundred dollars, or by both such fine and imprisonment. Any person convicted of a misdemeanor under this article for a second or subsequent offense shall be guilty of a felony."

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* Now Section 458 of the Election Law of the State of New York (L. 1965, c. 1031, eff. September 1, 1967).

ARGUMENT

I.

Appellant has failed to demonstrate the presence of any special circumstances or "danger of irreparable injury 'both great and immediate'", to warrant a departure from the well-recognized doctrine of abstention and federalism.*

It is the respectful submission of *Amicus Curiae* that the United States District Court was fully justified in its conclusion that the amended complaint did not state facts sufficient to warrant the relief therein sought and that the remedies available to appellant in the State of New York are adequate to safeguard his right of free speech and free expression pursuant to the First Amendment of the Constitution of the United States and Article 1, Section 8 of the New York State Constitution.**

It is our further submission that the appellant merely seeks to have this Court decide an "abstract, hypothetical or contingent question, . . ., or to decide [a] constitutional question in advance of the necessity for its decision. . . ."

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* *Douglas* v. *City of Jeannette,* 319 U.S. 157, 163-64 (1943).

** It is noteworthy that nearly three years have elapsed since appellant's initial arrest and prosecution pursuant to Section 781-b of the Penal Law of the State of New York, *supra,* (Amended Complaint, para. "FIFTH"—[R. 2]), and nearly two years since the affirmance by the New York Court of Appeals of the order of the Appellate Term of the New York State Sureme Court exonerating him (Amended Complaint, para. "THIRTEENTH"—[R. 3]). Appellant, however, has not seen fit to avail himself of the adequate equitable procedural avenue open to him in the courts of the State of New York. (See *Bunis* v. *Conway,* 17 A D 2d 207 [1962], *appeal denied,* 17 A D 2d 1036 [1962], *appeal dismissed,* 12 N Y 2d 882 [1963]; see pages 10-11, *infra.*

Alabama State Federation of Labor v. *McAdory,* 325 U.S. 450, 461 (1945). *Accord, United Public Workers of America* v. *Mitchell,* 330 U.S. 75, 89 (1947); *Electric Bond & Share Co.* v. *Securities and Exchange Comm'n,* 303 U.S. 419, 443 (1938). In short, the appellant's position herein is frivolous and without any legitimate support from adjudicated cases.

Appellant, in his amended complaint, alleges his intention and desire to distribute in the future and "in quantities of more than a thousand copies" the anonymous leaflet he distributed in 1964 "*and similar anonymous leaflets, all prepared by and at the instance of a person other than the plaintiff;*" to do so "at any time during the election campaign of 1966 and in subsequent election campaigns or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign of 1966." *Zwickler* v. *Koota,* 261 F. Supp. 985, 988 (1967); (Amended Complaint, para. "FOURTEENTH"—[R. 3] [Emphasis supplied]). An examination of the leaflet distributed by the appellant on October 29, 1964, and set forth in the opinion below (*Zwickler* v. *Koota,* 261 F. Supp., *supra,* at 987 [R. 5-6]), discloses that it consists primarily of excerpts from the Congressional Record concerning a statement made by Congressman Multer (then seeking re-election), as well as a comment by the writer of the leaflet with regard to the effect and purport of the Congressman's statement. Such a leaflet would not in any sense expose the writer to damages for libel, either civil or criminal. Indeed, appellant's counsel, himself, recognizes that "[a] reading of the leaflet . . . may raise a question whether it is libellous" (Brief for Appel-

lant, pp. 17-18). In *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), this Court limited state power, in a civil action brought by a public official, to an award of damages for a false statement made with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not. It is apparent, from the foregoing, that a mere quotation from the Congressional Record, coupled with a brief comment thereon, referring only to the possible effect thereof, would be insufficient to bring the instant situation within the scope of the rule laid down in *New York Times Co., supra.* It is manifest, therefore, that there was no need for anonymity on the part of the writer of the leaflet which the appellant distributed, and since the appellant states in his complaint that he only intends to distribute "similar anonymous leaflets" (Amended Complaint, para. "FOURTEENTH"—[R. 3]), appellant, as previously noted, is attempting to have this Court decide "[an] abstract, hypothetical or contingent question . . ." (*Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450, 461 (1945), *supra*). Thus, it is unlike *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965) (Brief for Appellant, pp. 19, 23-26), wherein the Court stated that "[a]lthough the particular seizure has been quashed in the state courts, the continuing threat of prosecution portends *further arrests and seizures,* some of which may be upheld and all of which will cause the organization inconvenience or worse." (*Id.* at 489; emphasis supplied) In addition thereto, the appellant, in *Dombrowski, supra,* "attacked the good faith of the appellees in enforcing the statutes, claiming that they have invoked, and threaten to continue to invoke, criminal process without any hope of ultimate success, but only to discourage appellants' civil rights activities." (*Id.* at 490.)

It is significant that in the court below, it was stated that "[t]he plaintiff does not accuse Aaron E. Koota, the District Attorney of Kings County, New York, of bad faith. Rather, he praises him as a 'diligent and conscientious public officer' . . ." (*Zwickler* v. *Koota,* 261 F. Supp. 985, 988 (1967), *supra;* (Amended Complaint, para. "FOURTEENTH" —[R. 3]).

It is respectfully submitted, therefore, that the appellant has failed to supply any special circumstances or danger of irreparable injury "both great and immediate" (*Dombrowski* v. *Pfister, supra; Keyishian* v. *Board of Regents,* 385 U.S. 589 [1967]; and *Baggett* v. *Bullitt,* 374 U.S. 360 [1964]), to justify this Court's exercise of its equitable discretion. In *Dombrowski* v. *Pfister,* 380 U.S. 479 [1965], *supra,* Mr. Justice Brennan aptly stated at 484-85:

> "* * * [T]he Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere *possibility* of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings. In *Douglas* v. *City of Jeannette,* 319 U.S. 157, for example, the Court upheld a district court's refusal to enjoin application of a city ordinance to religious solicitation, even though the ordinance was that very day held unconstitutional as so applied on review of a criminal conviction under it. *Murdock* v. *Pennsylvania,* 319 U S 105. . . . [T]he Court has found no special circumstances to warrant cutting short the

> normal adjudication of constitutional defenses in the course of a criminal prosecution. In such cases it does not appear that the plaintiffs 'have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court.' *Douglas* v. *City of Jeanette, supra,* [319 U.S.] at 164."

And in the same case, the Court, in affording to the petitioners equitable relief in the Federal jurisdiction, noted that:

> ". . . [T]he allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of of constitutional rights. They suggest that a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury.
>
> "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms." (*Id.* at 485-86.)

And continuing, it was observed that:

> "When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights." (*Id.* at 486.)

It is noteworthy that in the State of New York the appellant had and continues to have available to him equitable procedures for complete determination of whatever rights he may deem to have been violated by the statute involved herein. In the instant case, however, as will be amply shown in Argument II, *infra,* of this brief, Section 781-b of the Penal Law, *supra,* is a valid exercise by the State of New York of its obligation to insure the continuance of good government by proper election.

It is also noteworthy that in the instant case, it was noted by the court below (*Zwickler* v. *Koota,* 261 F. Supp. 985 [1967] *supra,* at 993):

> "There is available to the plaintiff a state remedy *short of asserting defenses in a criminal prosecution.*" (Emphasis supplied.)

In *Bunis* v. *Conway,* 17 A D 2d 207 [1962], *appeal denied,* 17 A D 2d 1036 [1962], *appeal dismissed,* 12 N Y 2d 882 [1963], *supra,* petitioner sought a declaratory judgment for an adjudication that the book "Tropic of Cancer" by Henry Miller was not "obscene" within the meaning of Section 1141 of the Penal Law of the State of New York. The court in *Bunis, supra,* significantly stated as follows:

> "An action for a declaratory judgment is the appropriate remedy for the determination of a justiciable controversy, where the plaintiff is in doubt as to his legal rights and wishes to avoid the hazard of taking action in advance of the determination of such rights (*James* v. *Alderton Dock Yards,* 256 N.Y. 298, 305).
>
> "It is the settled law that an action for a declaratory judgment will lie 'where a constitutional ques-

> tion is involved or the legality or meaning of a statute is in question and no question of fact is involved' (*Dun & Bradstreet* v. *City of New York,* 276 N.Y. 198, 206). The remedy of declaratory judgment is available, not only where the validity of a statute is in question, but also where its construction or its application to an undisputed set of facts is in question (*New York Foreign Trade Zone Operators* v. *State Liq. Auth.,* 285 N.Y. 272)." (*Id.* at 208.)*

It is obvious from the foregoing that the appellant may seek full and prompt determination of his First Amendment rights and privileges in the courts of the State of New York by means of an action for a declaratory judgment and for injunctive relief. Appellant, we submit, has urged quite properly (Brief for Appellant, pp. 22-27) that an expeditious determination of rights guaranteed by the First Amendment of the United States Constitution is imperative. Insofar as the appellant is concerned, however, it is respectfully submitted that his zeal for expedition has been more honored in the breach than in the observance. Although more than a year has elapsed since the determination below (September 19, 1966), nearly two years since the determination of the New York Court of Appeals exonerating appellant (Amended Complaint, para. "THIRTEENTH" [R. 3]) and nearly three years since appellant's initial arrest and prosecution pursuant to Penal Law, Section 781-b, *supra* (Amended Complaint, para. "FIFTH" [R. 2]), appellant has done nothing to seek redress of his alleged grievances against this section of the Penal Law,

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* In view of the nature of the leaflet distributed by the appellant in October, 1964 (*Zwickler* v. *Koota,* 261 F. Supp. 985 [1967], *supra,* at 987), it is respectfully urged that the appellant would not prevail on the merits under New York procedures.

by invoking the equitable jurisdiction of the courts of the State of New York. It is, thus, our respectful submission that the primary responsibility for delay in the ultimate adjudication of the substantive issues raised herein rests primarily with the appellant. We emphasize, moreover, that his failure to promptly invoke his state remedies have been occasioned by the lack of merit in his attack upon Section 781-b of the Penal Law, *supra* (see Brief of *Amicus Curiae,* Argument II, *infra*), and that by failing to take advantage of state procedures open to him, he now attempts to "traipse" through this Court in order to have it entertain a non-meritorious and frivolous claim involving nothing more than a subject which, in its present posture, is merely one of academic interest.

There is, therefore, no compelling reason for departing from the well-established doctrine of "Federalism" which was reiterated in *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), *supra,* and has been consistently followed by this Court, except where there are present unusual and exceptional circumstances. (*Douglas* v. *City of Jeannette,* 319 U.S. 157 [1943], *supra, Watson* v. *Buck,* 313 U.S. 387 [1941]; *Beal* v. *Missouri Pac. R. Co.,* 312 U.S. 45 [1941]; *Speilman Motor Sales Co.* v. *Dodge,* 295 U.S. 89 [1935]; *Fenner* v. *Boykin,* 271 U.S. 240 [1926].)

And equally significant is the statement made by Mr. Justice White in *Baggett* v. *Bullitt,* 377 U.S. 360 (1964), *supra,* at 375:

> "The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers. As-

> certainment of whether there exists the 'special circumstances', (citation omitted), prerequisite to its application must be made on a case-by-case basis."

In view of the fact that appellant may secure prompt adjudication of his grievances in the courts of the State of New York (Section 3001, N.Y. Civil Practice Law and Rules; *De Veau* v. *Braisted,* 5 AD 2d 603 [1958] *aff'd,* 5 NY 2d 236 [1959], *aff'd,* 363 U.S. 144 [1960]; *Bunis* v. *Conway,* 17 AD 2d 207 [1962], *appeal denied,* 17 AD 2d 1036 [1962], *appeal dismissed,* 12 NY 2d 882 [1963], *supra;* see cases annotated in 10 ALR 3rd, 727), it is our respectful submission that appellant has not presented a scintilla of proof that would warrant a departure by this Court from the well-recognized doctrine of abstention.

There is still another reason for adhering to the doctrine of abstention in the instant case. Unlike the unusual circumstances present in *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), *supra* (wherein the complaint alleges a pattern of prosecution undertaken in bad faith, with little hope of success save for the harassment of members of a Civil Rights Organization dedicated to the amelioration of the condition of the socially and economically-disadvantaged), the amended complaint in the instant case contains no such allegation, but, on the contrary (Amended Complaint, para. "EIGHTEENTH" [R. 4]) alleges that by reason of appellant's arrest and prosecution, commencing in October of 1964, he fears future prosecutions in the County of Kings for the reason that, in appellant's own words, "[the District Attorney of Kings County] is a diligent and conscientious public officer and pursuant to his duties intends or will again prosecute the plaintiff for his acts of distribution

as aforesaid." (Amended Complaint, para. "EIGHTEENTH" [R. 4]. Nowhere in the amended complaint is there to be found any direct threat of immediate prosecution, nor any allegation of bad faith on the part of the appellee. It is respectfully submitted, therefore, that in the absence of exceptional and unusual circumstances, not here present, the court below properly exercised its discretion in dismissing the complaint. (*Watchtower Bible and Tract Society* v. *City of Bristol,* 24 F. Supp. 57, 59 [Dist. Ct., Conn. 1938] *aff'd,* 305 U.S. 572 [1938]; *Douglas* v. *City of Jeannette,* 319 U.S. 157, 164 [1943] *supra; Spielman Motor Sales.Co.* v. *Dodge,* 295 U.S. 89, 95, 96 [1935], *supra.*)

Appellant attempts to justify his failure to avail himself of the equitable remedies available to him in the courts of the State of New York for a period of nearly three years upon the ground that (Brief for Appellant, p. 20) "[u]nder New York law the remedy of declaratory judgment is a discretionary one (citations omitted)." However in the following sentence the appellant concedes that "[t]he exercise of equitable jurisdiction by a District Court is likewise discretionary" (Brief for Appellant, p. 20). Thus, appellant, we submit, has offered no valid reason for ignoring the state *equitable procedures* available to him as previously noted.

Since "discretionary application" is the key to both state and federal exercise of the remedies afforded, the appellant was not justified in avoiding earlier possible relief under state procedures in the belief that the exercise of discretion by a Federal Court would be more profitable. Therefore, the appellant's chilling in the exercise of his rights, which he maintains (Brief for Appellant, p. 22), has been self-imposed.

Appellant states at page 21 of his Brief that:

> "Zwickler should not be required to be martyr to seek relief only after a conviction. Under this statute, it will be recalled, a second conviction for handing out a leaflet is a felony."

However, the appellant was exonerated by the courts of the State of New York of any criminal liability for such distribution and, hence, his present status would render him liable only to a misdemeanor upon a first conviction.

The cases upon which the appellant relies are inapposite. In *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965) *supra,* as previously noted, the petitioners and the Civil Rights Organization to which they belonged had been the subject of considerable harassment including an invalid search and seizure and there was, according to the complaint, threats of future prosecutions in bad faith instituted for the sole purpose of harassment, without any hope of success.

In *Baggett* v. *Bullitt,* 377 U.S. 360 (1964) *supra,* the petitioners, "members of the faculty, staff and student body of the University of Washington . . . brought this *class* action asking for a judgment declaring unconstitutional two Washington statutes requiring the execution of two different oaths by state employees and for an injunction against the enforcement of these statutes by appellees. (*Id.* at 361; emphasis supplied.)

It is to be noted at the outset that the instant case does not involve a representative or class action, but was brought by the appellant in his individual capacity and, thus, his position in this Court must be evaluated solely upon his status as evinced from an analysis of the amended complaint in the light of the decisions of this Court.

In *Baggett, supra,* the statutes involved were found to be unconstitutional on their face. In the instant case, however, Section 781-b of the Penal Law, *supra,* does not suffer, we submit, from any such infirmity (Brief of *Amicus,* ARGUMENT II, *infra*).

It is respectfully submitted that *Baggett* v. *Bullitt, supra,* does not inure to appellant's benefit but, on the contrary, the Court in that case declined to apply the doctrine of abstention, stating:

> "It is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty. Abstention does not require this." (377 U.S., *supra,* at 378.)

In the case of *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967), *supra* (Brief for Appellant pp. 19, 21, 26) the petitioners, members of the faculty of the University of the State of New York sought a declaratory judgment to invalidate certain state statutes and administrative regulations designed to "prevent the appointment or retention of 'subversive' persons in state employment (*Id.* at 592). The Court in holding that the doctrine of abstention should not be applied, stated:

> "In the light of the intricate administrative machinery for its enforcement, this is not surprising. The very intricacy of the plan and the uncertainty as to the scope of its proscriptions make it a highly efficient *in terrorem* mechanism. It would be a bold teacher who would not stay as far as possible from utterance or acts *which might jeopardize his living* by enmeshing him in this intricate machinery." (*Id.* at 601; emphasis supplied.)

It is respectful submission of *Amicus Curiae* that neither *Baggett* v. *Bullitt*, 377 U.S. 360 (1964), *supra* and *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967), *supra*; (Brief for Appellant pp. 19, 21, 26) involve an action to enjoin a state prosecutor from enforcing a state law. It is our further submission that these cases are completely inapposite to the issues presented in the case at bar and that the dismissal of the amended complaint in the court below was a proper exercise of judicial discretion. (*Douglas* v. *City of Jeannette*, 319 U.S. 157 [1943], *supra*, cited with approval in *Dombrowski* v. *Pfister*, 380 U.S. 479, 485 [1965], *supra*; *Harrison* v. *NAACP*, 360 U.S. 167 [1959].)

Mention must also be made of *Evers* v. *Dwyer*, 358 U.S. 202 (1958), upon which appellant also relies. (Brief for Appellant, pp. 21-22.) In *Evers, supra*, the facts were strong enough to indicate the existence of special circumstances or "danger of irreparable injury 'both great and immediate'" (*Douglas* v. *City of Jeanette*, 319 U.S. 157, 163-64 [1943], *supra*), to have warranted the relief sought, following an action to declare the ordinance invalid. As the entire Court so pertinently declared:

> "A resident of a municipality who cannot use transportation facilities therein without being subjected by statute to special disabilities necessarily has, we think, *a substantial, immediate, and real interest* in the validity of the statute which imposes the disability." (*Id.* at 204; emphasis supplied.)

It must be emphasized that the right sought to be enforced by the aggrieved party in *Evers, supra*, was one so basically fundamental that it tended to destroy the philosophy of equality etched into the Bill of Rights, regardless of race, color or creed.

In sum, it is the respectful submission of *Amicus Curiae* that Section 781-b of the Penal Law of the State of New York, *supra,* is constitutional (ARGUMENT II, infra); that appellant has failed to establish such "special circumstances" or threat of irreparable injury to warrant granting of the relief prayed for in the amended complaint; that appellant has had and continues to have an adequate equitable procedural avenue open to him in the courts of the State of New York; and that any delay in the adjudication of the substantive issues raised by the appellant were occasioned by his own laches over a considerable period of time.

II.

Section 781-b of the Penal Law of the State of New York, *supra,* does not violate the constitutional guarantees of freedom of speech and of the press (First Amendment, Constitution of the United States and Article I, Section 8, New York State Constitution). The statute is a proper exercise of the State's police power, being neither vague, imprecise nor overly broad.

In order to support the position taken by *Amicus Curiae* in ARGUMENT "I", *supra,* i.e., that the abstention doctrine was properly applied by the court below, it becomes necessary to emphasize the merit of the statute herein involved. Accordingly, we respectfully reiterate that any contention that Section 781-b of the Penal Law of the State of New York denigrates fundamental rights, is without merit.

In *Talley* v. *California,* 362 U.S. 60 (1960), *supra,* relied upon by the appellant, this Court invalidated a municipal

ordinance of Los Angeles making it a criminal offense to distribute "any hand-bill, in any place under any circumstances", unless it had printed on the cover, or face, the name and address of the person ". . . who printed, wrote, compiled or manufactured" it, and of the "person who caused the same to be distributed." Although counsel supporting the validity of the ordinance contended that it was aimed at providing a method of identifying persons responsible for fraud, false advertising and libel, the Court was not impressed with the argument thus advanced. It is significant that Mr. Justice Black, in the majority opinion, stated (*Id.* at 64):

> ". . . [T]he ordinance is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose. *Therefore we do not pass on the validity of an ordinance limited to prevent these or any other evils.* This ordinance simply bars *all* handbills under *all circumstances anywhere* that do not have the names and addresses printed on them in the place the ordinance requires." (Emphasis supplied.)

The comment by Mr. Justice Black (*Id.* at 64) regarding the important role played in history by anonymous publications, does not represent the majority view and, in that respect, must be deemed to be *dicta.*

It is apparent that the Court's condemnation of the ordinance was predicated upon its "broadness", and, so fashioned, tended "to restrict freedom to distribute information and thereby freedom of expression" (*Id.* at 64).

Mr. Justice Harlan, in a separate concurring opinion, condemned the ordinance for its failure to limit its purpose and stated that:

> "In the absence of a more substantial showing as to Los Angeles' actual experience with the distribution of obnoxious handbills, such a generality is for me too remote to furnish a constitutionally acceptable justification for the deterrent effect on free speech which this *all-embracing ordinance* is likely to have." (*Id.* at 66-67.) (Emphasis supplied.)

It is noteworthy that in *Talley, supra,* the dissenting opinion rendered by Mr. Justice Clark, joined in by Mr. Justice Frankfurter and Mr. Justice Whittaker, made reference to corrupt practices acts, similar to Section 781-b of the Penal Law, *supra,* which outlaw the distribution of anonymous publications with reference to political candidates, and sought to uphold the validity of the Los Angeles ordinance in issue in *Talley, supra,* by comparing it with such acts whose validity "have expressed the overwhelming policy of the Nation" (*Id.* at 70).

Thus, a statute similar to the section of law now in issue before this Court, was not considered in *Talley, supra,* and thereby that case has no applicability herein.

In *People* v. *Mishkin,* 17 AD 2d 243 (1962), also relied upon by the appellant herein, and affirmed by the New York Court of Appeals on December 3, 1964 (15 NY 2d 671), the statute held unconstitutional was Section 330, Subdivision 2, of the General Business Law. That section provided that every publication printed after September 1, 1956 (other than newspapers, magazines or other periodicals for which separate provision is made) shall "conspicuously have imprinted on the cover, title, or copyright page, or at the end of the publication, the true name and address of the publisher or printer". The court invalidated the statute on the authority of *Talley* v. *California, supra.*

However, in the *per curiam* opinion in *Mishkin,* the court stated (17 AD 2d at 244):

> "The District Attorney suggests that the statute may be found constitutional if its application is limited to obscene publications for there would be a purpose in facilitating the discovery of the publisher. *But the statute itself is not so limited, and there is nothing to indicate that this was the legislative purpose. We do not reach the question whether such a purpose would validate the statute.*" (Emphasis supplied.)

Following the decision in *Mishkin,* 17 AD 2d 243, *supra,* on November 27, 1962, Section 330, Subdivision 2, of the General Business Law was amended to read as follows:

> "2. Every publication printed or reprinted after September first, nineteen hundred sixty three which is so composed or illustrated as a whole as to be devoted to the description or portrayal of bondage, sadism, masochism or other sexual perversion or to the exploitation of sex or nudity and published in this state shall conspicuously have imprinted on the cover, title or copyright page or at the end of the publication the true name and address of the publisher or printer. As amended L. 1963, c. 703, eff. September 1, 1963."

This significant change in the legislative enactment of Section 330, Subdivision 2, of the General Business Law, was an expression of the Legislature's belief that such a change, since it was *limited* in range, would not be criticized in view of similar legislation with regard to corrupt practices outlawing the distribution of anonymous publications with reference to the *limited* area of political candi-

dates and political issues. The scope of the new change in Section 330, Subdivision 2, of the General Business Law, *supra,* has been limited so as to include "[e]very publication" dealing with "obscenity" in lieu of the previous wording of the statute which dealt with *all* publications other than newspapers, magazines or other periodicals.

Broadness was again the basis for the Court's determination in *Lovell* v. *Griffin,* 303 U.S. 444 (1938), and *Schneider* v. *New Jersey* (*Town of Irvington*), 308 U.S. 147 (1939). In *Lovell, supra,* the Court invalidated an ordinance which prohibited *all* distribution of literature at *any time or place in Griffin, Georgia* without a license on the ground that so broad an interference was unnecessary to accomplish legitimate municipal aims. As Mr. Chief Justice Hughes stated in *Lovell* (303 U.S., *supra,* at 451):

> ". . . The ordinance is not limited to 'literature' that is obscene or offensive to public morals or that advocates unlawful conduct. There is no suggestion that the pamphlet and magazine distributed in the instant case was of that character. *The ordinance embraces 'literature' in the widest sense.*" (Emphasis supplied.)

In *Schneider, supra,* the Court in reviewing ordinances of four different municipalities which either banned or imposed prior restraints upon the distribution of handbills stated (by Mr. Justice Roberts):

> "In every case, therefore, where legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preference or beliefs respecting matters of public convenience may well support regulation directed at other personal

> activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulations of the free enjoyment of the rights." (308 U.S., *supra,* at 161.)

It is thus crystal-clear that *Lovell* v. *Griffin, supra,* and *Schneider* v. *Irvington, supra,* are readily distinguishable from the facts of the instant appeal for in neither case was the United States Supreme Court called upon to determine the issue of "anonymity." The holdings in these cases were reaffirmed in *Jamison* v. *Texas,* 318 U.S. 413 (1943).

In *Shelton* v. *Tucker,* 364 U.S. 479 (1960), relied upon by appellant (Brief for Appellant, p. 9), the United States Supreme Court condemned an Arkansas statute which compelled every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing *without limitation* every organization to which he had belonged or regularly contributed within the preceding five years. It is noteworthy that the statute under judicial scrutiny in *Shelton, supra,* was one which again encompassed a broad area. Mr. Justice Stewart, in speaking for the majority, significantly stated at pages 487-88:

> "The question to be decided here is not whether the State of Arkansas can ask certain of its teachers about all their organizational relationships. It is not whether the State can ask all of its teachers about certain of their associational ties. It is not whether teachers can be asked how many organizations they belong to, or how much time they spend in organizations they belong to, or how much time they spend in

> organizational activity. The question is whether the State can ask every one of its teachers to disclose every single organization with which he has been associated over a five-year period. *The scope of the inquiry required by Act 10 is completely unlimited.* The statute requires a teacher to reveal the church to which he belongs, or to which he has given financial support. It requires him to disclose his political party and every political organization to which he may have contributed over a five-year period. *It requires him to list, without number, every conceivable kind of associational tie—social, professional, political, avocational, or religious. Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness.*
>
> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." (Emphasis supplied.)

And continuing at 490, Mr. Justice Stewart declared:

> "The *unlimited and indiscriminate sweep* of the statute now before us brings it within the ban of our prior cases. The statute's *comprehensive* interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers." (Emphasis supplied.)

Amicus Curiae is mindful of the fact that a State may not unreasonably make any law abridging freedom or liberty of speech or the press (First and Fourteenth Amend-

ments to the United States Constitution; Article 1, Sections 6 and 8, of the New York State Constitution). (See *Gitlow* v. *New York*, 268 U.S. 652, 666 [1924]; *Whitney* v. *California*, 274 U.S. 357, 373 [1927]; *Grosjean* v. *American Press Co.*, 297 U.S. 233, 243, 244 [1936].) The right to "speak freely" is the foundation of democratic government, and as expounded by Mr. Justice Holmes in *United States* v. *Schwimmer*, 279 U.S. 644, 654-55 (1929) (dissenting opinion), "[I]f there is any principle of the [U.S.] Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate." Yet it is significant that until about 1922, the United States Supreme Court accepted the view that the Fourteenth Amendment did not make the First Amendment binding on the states. (See *Prudential Insurance Co.* v. *Cheek*, 259 U.S. 530, 543 [1922].) In 1925, the Court in *Gitlow* v. *New York, supra*, at 666, "ventured the tentative assumption that the 'freedom' of speech protected by the First Amendment was included in the 'liberty' which the Fourteenth Amendment required the states to respect." (See DUMBAULD, BILL OF RIGHTS AND WHAT IT MEANS TODAY 133 [1957].) Eventually, through the process of "incorporation" or "absorption," all of the First Amendment liberties were made binding against the states. In the area of free speech, the case of *West Virginia State Board of Education* v. *Barnett*, 319 U.S. 624, 633 [1943], is particularly noteworthy as showing just when a state may not be permitted to censor or suppress expression of opinion. Thus, although a flag salute was involved, it was the Court's view that "[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the indi-

vidual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." (*Id.* at 634.)

Yet, notwithstanding the sacrosanct nature of First Amendment freedoms, particularly the one concerned with freedom of expression, a state may, in the exercise of its police power, place reasonable regulations and restrictions upon this constitutional guarantee in the interest of public order. (See *Davis* v. *Massachusetts,* 167 U.S. 43, 47 [1897]; *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 439 [1911]; *Schenck* v. *United States,* 249 U.S. 47, 52 [1919]; *Gitlow* v. *New York,* 268 U.S. 652, *supra,* at 667; *Whitney* v. *California,* 274 U.S. 357, 371 [1927] *supra; Cantwell* v. *Connecticut,* 310 U.S. 296, 304 [1939].) It is particularly significant that in *Whitney, supra,* Mr. Justice Brandeis, in a concurring opinion, recognized that free speech is not an absolute right. (274 U.S. 357 [1927], *supra,* at 373.)

Also:

> "No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far." (Mr. Justices Black and Douglas in *Board of Education* v. *Barnette,* 319 U.S. 624 (1943), *supra,* at 643.)

In a more recent case, this Court, in a majority holding, rejected the argument that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." (See *Adderley* v. *Florida,* 385 U.S. 39, 47-48 [1966] [Black, J.].)

To paraphrase Mr. Chief Justice Hughes, the excesses of free speech are apt to destroy free speech itself, unless properly fettered. (See *Cox* v. *New Hampshire*, 312 U.S. 569, 574 [1941].)

We also quote as particularly apt the oft-quoted language of Mr. Justice Holmes in *Schenck* v. *United States*, 249 U.S. 47 (1919), *supra*, wherein he said:

> "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction from uttering words that may have all the effect of force." (*Id.* at 52.)

With regard to the purpose intended by the passage of Section 781-b of the Penal Law, several states have penal statutes, conceived, as is our statute, to elevate political utterances to a level of respectability, sincerity, accuracy, and fair criticism, so necessary in a form of government such as ours. Some of these statutes are as follows:*

KANSAS GENERAL STATUTES, 1949 (Elections—Corrupt Practices):

> "SECTION 25-1714:
>
> *Anonymous publication criticizing personal character or political action of candidate; penalty*
>
> Whoever intentionally writes, prints, posts or distributes, or causes to be written, printed, posted, or distributed, a circular or poster which is designed or tends to injure or defeat any candidate for nomination or election to any public office, by criticizing

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* In *Talley*, 362 U.S. 60 (1960), *supra*, at 70, the Court indicated that there are 36 states with statutes prohibiting the anonymous distribution of material relating to elections.

his personal character, or political action, unless there appears upon such circular or poster in a conspicuous place either the names of the chairman and secretary or of two officers of the political or other organization issuing the same, or some voter who is responsible therefor, with his name and residence, and the street number thereof, if any, shall be punished by imprisonment by not more than six months.

(L. 1913, ch. 189, sec. 5; April 30; R.S. 1923, Section 25-1714.)"

(This statute was held constitutional in *State* v. *Freeman,* 143 K. 315, 316, 318, 55 P. 2d 362.)

MINNESOTA STATUTES ANNOTATED, CORRUPT PRACTICES, Book 14A:

"SECTION 211.08: *Campaign literature matter must include names*

Any person or committee who shall publish, issue, post, or circulate, or cause to be published, issued, posted, or circulated, otherwise than in a newspaper, as provided in section 211.03, any literature, campaign material, or any publication, including but not limited to cards, pamphlets, flyers, signs, banners, leaflets, tending to influence voting at any primary or election which fails to bear on the face thereof the name and address of the author, the name of the candidate in whose behalf the same is published, issued, posted or circulated, and any person, firm, corporation or committee who shall knowingly make or publish or cause to be published, any false statement in relation to any candidate or proposition to be voted upon, which statement is intended to or tends to affect any voting at any primary or election, shall be guilty of a misdemeanor; provided, nothing herein contained shall be construed as modi-

fying or repealing any of the provisions of section 210.11. As amended, Laws, 1963, c. 861, section 6."

PAGE'S OHIO REVISED CODE ANNOTATED:

"SECTION 3599.09 (*Elections*)

(A) No person shall write, print, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence address of the chairman or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefore, except that when such publication by the regularly constituted central or executive committee of a political party, organized as provided in Chapter 3517 of the Revised Code, it shall be sufficiently identified if it bears the name of the committee and its chairman. No person, firm, or corporation shall knowingly print or reproduce any notice, placard, dodger, advertisement, sample ballot, or any other form of publication in violation of this section.

A candidate shall not be required to place his address on literature promoting his own candidacy.

(B) . . . . [Applicability to Radio and TV material covering same subject matter.]

(History: 129 v 244, Section 1, Eff. 10-16-61; 130 v H351, Section 1, Eff. 8-19-63.)"

PURDON'S PENNA. STATUTES ANNOTATED, TITLE 25:

"SECTION 3546: *Anonymous Publication—libel*

Any person who writes, prints, posts or distributes, or causes to be written, posted or distributed, a circular or poster, cartoon, or other written or printed paper which is designed or tends to injure or defeat any candidate for nomination or election to public office, by reflecting on his personal character or political actions, unless the same shall be published in a newspaper avowed responsible therefor, or unless there appears on such circular, poster, cartoon or paper, in a conspicuous place, either the names of the chairman and secretary, or at least the names of at least two officers of the political or other organization issuing the same, or the name of some duly registered elector with description of his election district, as responsible therefor, shall be sentenced to pay a fine not exceeding five hundred ($500) dollars, or to undergo an imprisonment of not more than six (6) months, or both, in the discretion of the court, and if the statements are untrue, the person so offending shall also be guilty of libel and subject to criminal prosecution and civil action therefor. 1937, June 3, P.L., 1933, article XVIII, Section 1846."

The validity of the Pennsylvania statute hereinabove set forth was upheld in *Commonwealth* v. *Evans,* 156 Pa. Super. 321, 325-27, 40 A. 2d 137, 138-39 (1945), *supra,* wherein Judge Reno in expressing with great clarity the underlying rationale for such legislation stated:

"The purpose of the statute is . . . obvious. It compels persons who charge candidates with private frailties or political misconduct to avow responsibility for their assertions. It prohibits campaigning in a cloak of anonymity; it compels a writer, exercising his right to the freedom of the press, to dis-

close his identity and assume responsibility just as a speaker, exercising his right of free speech, identifies himself by the very act of articulation, and, *ipso facto,* becomes responsible for his utterance. *It is an attempt to raise the ethical standards of political discussion, to promote fair play, and fair competition in politics, to banish cowards from the political arena, and extirpate the dirty business of surreptitious character assassination.* The section represents the views of both major political parties of the Commonwealth, and even the judiciary is not so remote from the realities of political life that it cannot recognize it as wholesome and desirable legislation.

"The power of the legislature in the premises is wholly free from doubt. *The section of the Bill of Rights which guarantees the effably precious right of literary expression does not contain one syllable which protects anonymous writers.* The Constitution shields only those who openly and in good faith publicly examine the official and private conduct of candidates for public office (citing cases). *The Constitution itself imposes responsibility as a condition to the exercise of the right, and that condition empowers the legislature to enact law under which identity must be disclosed and responsibility assumed.* 11 Am. Jur., Constitutional Law, Sec. 321 This is the real purpose of the statute. *It does not deny any person his constitutional right to write or print information concerning a candidate.* The section merely requires disclosure of the identity of the writer or publisher, that is, *it requires only the open assumption of the responsibility imposed by the Constitution. The appellee's contention when exposed to examination in the light of the Constitution, becomes a specious plea for the exercise of a right*

without acknowledging the existence of a correlative duty.

"The legislation is amply sustained by the police power of the Commonwealth. Under that power, the legislature may certainly promote clean campaigning and pure elections by regulations that have a real and substantial relation to the object to be attained, and which merely result in such a limited restraint upon the activities of candidates for public office, and of their advocates, *as may be deemed necessary to prevent the electorate from being unduly influenced by prejudicial matter which, whether true or false, does not emanate from a responsible source.** Upon this power statutes forbidding participation in political activities by civil service officers and corrupt practices acts have been sustained though obviously they do not limit to a degree the exercise of the constitutional liberty of free expression. 11 Am. Jur., Constitutional Law, Sec. 319. The police power may be employed to place reasonable restraints upon the exercise of the right of expression. *Com.* v. *Widovich* (295 Pa. 311, 145 A. 295). It cannot be doubted that a power that possesses sufficient vitality to require the newspapers of the Commonweath to publish the names of the persons who are responsible for their editorial and managerial policies (*Com.* v. *Short,* 228 Pa. 279, 77 A. 449) can also reach the writers of fugitive political circulars and compel them to acknowledge their responsibility." (Emphasis supplied.)

In accord, Chronicle & Gazette Publishing Company, Inc. v. *Attorney General* (New Hampshire), 48 A. 2d 478 (1946),

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* It is respectfully submitted that it is the danger of misleading the electorate by irresponsible sources which creates the greatest need for such a statute. (See text, *infra.*)

in which Justice Kenison cited with approval the opinion in *Evans, supra.*

In *Garrison* v. *Louisiana,* 379 U.S. 64 (1964) this Court held that the constitutional guaranty of free speech is violated by a state statute which sanctions punishment of truthful criticism of public officials if made with actual malice, defined to be "hatred, ill will, or enmity or a wanton desire to injure", and of false statements made with ill will, even though they are not made with knowledge of their falsity or in reckless disregard of whether they are true or false. Thus, *Garrison, supra,* by limiting state power to impose criminal sanctions for criticism of the official conduct of public officials thereby applied the rule laid down in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), *supra,* which limited state power, in a civil action brought by a public official, to an award of damages for a false statement made with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

The Louisiana Criminal Defamation statute (La. Rev. Stat. 1950, Title 14) denigrated in *Garrison, supra,* was not analogous to the statute in the instant appeal for in *Garrison* the gravamen of the charge concerned itself with the right of one to openly make statements which might tend to injure another's private or public reputation, whereas in the present case the pertinent issue revolves about *anonymity of political expression "whether in favor of or against* (Section 781-b of the Penal Law, *supra*)".

It cannot be said that the language in the instant statute, "whether in favor of or against," is without significance. It spells out the basic meaningful purpose of the statute as one promulgated to protect the public, as a whole, from ir-

responsible expression in matters of election and political information and conduct (although it also affords to the person maligned the opportunity of knowing the identity of his libeller).

It is obvious that this unique New York statute of a purely political nature is designed to assure a sound and stable government, an end which cannot yield to possible false or baseless statements of a political type which are anonymously written, notwithstanding that such statements may even be praiseworthy.

Thus, Mr. Justice Brennan, speaking for the majority in *Garrison*, succinctly stated:

> "The use of calculated falsehood, however, would put a different case on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as *an effective political tool to unseat the public servant or even topple an administration.* Cf. Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col L Rev 1085, 1088-1111 (1942). *That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.* Calculated falsehood falls into that class of utter-

> ances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . .' *Chaplinsky* v. *New Hampshire,* 315 US 568, 572, 86 L ed 1031, 1035, 62 S Ct 766. *Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.''* (379 U.S., *supra,* at 75, emphasis supplied.)

Certainly, then, at least with regard to the knowingly false statement and the false statement made with reckless disregard of the truth, *which do not enjoy constitutional protection,* (Brennan, J. in *Garrison, supra,* at 75), the utterer, garbed in the cloak of anonymity, ought not to be heard to complain if his identity is demanded since no right of his would be violated. It would thus appear that the unidentified utterer of statements which are either in the form of twisted and perverted conclusions, or are designed to influence the electorate, ''whether in favor of or against,'' should not be afforded any other treatment or placed in any more advantageous position. Political expression must not be free from restraints; otherwise dangerous, distorted and irresponsible views and philosophies may be foisted upon an unwary public with devastating effect simply because the foreboding spectre of anonymity would leave unchallenged baseless criticism. Such criticism, if unchecked, would encourage further onslaughts with a corroding result upon a society steeped in democratic principles. This same destructive effect would also be possible if unreliable, though praiseworthy, statements be ''seeped through'' anonymously to the public, thereby making possible the voting into authority of dangerous or in-

effectual persons or matters.* It is conceivable, therefore, that permitting anonymous political expression in violation of the statute now before this Court might very well have the deleterious consequence of seriously undermining cherished liberties, other than freedom of expression.

Any contention that the cases of *Garrison,* 379 U.S. 64 (1964), *supra,* and *New York Times,* 376 U.S. 254 (1964), *supra,* have "watered down" the need to reject anonymity in political expression is neither apparent nor real. It cannot be inferred that the rules prescribed in these cases limiting state power with regard to civil and criminal sanctions now endorse anonymity. Rather, these cases emphasize the need to tear away the cloak of anonymity in at least the proscribed limited areas. Otherwise, "limit" would take on the incompatible meaning of "destroy", by granting an illusory right to the person defamed by a calculated falsehood. More vital indeed is the need for the electorate, *as a whole,* to know if the purveyor of expression, within the ambit of Section 781-b of the Penal Law, *supra,* is worthy of belief or not, than is the concern of whether any possible false statement, maliciously or recklessly made, has personally injured any *one* person, for only in that way will such expression become the essence of self-government (*Garrison* v. *Louisiana,* 379 U.S. 64 (1964), *supra,* at 75). Anonymity begets fabrication and hampers the dissemination of credible information regarding the merits of political candidates and political and election matters. Multiply this throughout the Nation, and the need for disclosure becomes manifest.

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* See generally, Note, *Avoidance of an Election or Referendum When Electorate Has Been Misled,* 70 Harv. L. Rev. 1084-89 (1957).

It must be emphasized again that the instant statute is designed to protect the citizenry not only with regard to obnoxious election and political literature, but, more important, against the dissemination of misleading information concerning matters inseparably entwined with the elective franchise. The statute in no wise proscribes anonymity in printing, publishing, reproducing or distributing in quantity, any "handbill, pamphlet, circular, post card, placard or letter" in matters *unrelated* to elections. The statute, therefore, not being overly broad, and intended to assure insofar as possible, an intelligent and better-informed electorate, does not unduly interfere with free expression. The appellant points out that in *Schneider* v. *New Jersey* (*Town of Irvington*), 308 U.S. 147 (1939), *supra,* this Court had before it "the question of the balancing of interests" (Brief for Appellant, p. 15). It is significant that the "balancing of interests" test denies that any speech has an absolute right of protection under the First Amendment. By this test, "conduct is regulated in the interest of public order," so that it becomes necessary to allow the operation of a regulation albeit there will result an "indirect, conditional, partial abridgement of speech." (See *American Communications Assn.* v. *Douds,* 339 U.S. 382, 399 [1950].)* The courts in applying this new formula would be required, in each case, to "balance individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression." (See Emerson, *Towards a General Theory of the First Amendment,* 72 Yale L.J. 877, 912 [1963].)

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* It was in *Douds* that Mr. Chief Justice Vinson first enunciated the "balancing of interests" test.

It is respectfully submitted that it is this test which this Court must consider in upholding the statute as a proper exercise of the police power of the State of New York. The test was also recognized in *Dennis* v. *United States,* 341 U.S. 494, 510 (1951), *affirming* 183 F. 2d 201, 212 (2d Cir. 1950), wherein four of the six members of this Court, who joined in upholding the conviction, accepted Chief Judge Learned Hand's restatement of the "clear and present danger" test,* thereby diluting it into a balancing test.

That the "balancing" test has continued to maintain its effectiveness is evident from the holdings in *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 461 (1958); *Barenblatt* v. *United States,* 360 U.S. 109, 126-27 (1959); *Konigsberg* v. *State Bar,* 366 U.S. 36, 49-51 (1961); *United States* v. *Aarons,* 310 F. 2d 341, 345 (2d Cir. 1962); and *United States* v. *Miller,* 367 F. 2d 72 (2d Cir. 1966), *cert. denied,* 386 U.S. 911 (1967).

Appellant, in speaking of balancing of interests, relies upon *Schneider* v. *New Jersey* (*Town of Irvington*), 308 U.S. 147 (1939) *supra,* and attempts to equate the "remedy against the purposeful litterer," with one against a malicious libeller. (Brief for Appellant, pp. 15-16.) The appel-

* The restatement by Judge Hand is inherent in the language: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. We have purposely substituted 'improbability' for 'remoteness,' because that must be the right interpretation. Given the same probability, *it would be wholly irrational to condone future evils which we should prevent if they were immediate;* that can be reconciled only by an indifference to those who come after us." (183 F. 2d at 212, emphasis supplied.) Thus, the probable misleading of the electorate by anonymous "printing, publishing, reproducing or distributing," "justifies such invasion of free speech as is necessary to avoid the danger."

lant fails to point out that it is comparatively easier for the public to detect a litterer, whose act is hardly performed in secrecy, than it is to determine the identity of the concealed disseminator of false and misleading, or obnoxious, election or political matter.

Insofar as the statute is concerned, the need for a better-informed electorate cannot take a "back seat" to any purported right of free expression which the appellant now seeks to assert. The function of government is to prevent the exercise of rights it, itself, has bestowed upon the populace if that will interfere with, and endanger, the processes of a democratic existence which *all* its citizens are meant to enjoy. Thus, individual rights must yield to the greater rights of the electorate and so preserve good government. Certainly there is soundness in the approach which secures the "greatest good of the greatest number," * and the desire to attain that goal dictates the hesitancy to invalidate statutes as violative of constitutional mandates.

As succinctly stated by Judge Cardozo (later Mr. Justice Cardozo) in *People ex rel. Alpha P.C. Co.* v. *Knapp*, 230 N.Y. 48 (1920), at 62-63:

> "Laws are not to be sacrificed by courts on the assumption that legislation is the play of whim and fancy. . . . Our right to destroy is bounded by the limits of necessity. Our duty is to save unless in saving we pervert. *When all the world can see what sensible legislators in such a contingency would wish that we should do, we are not to close our eyes as*

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* The original synthesis of the famous English jurist and thinker, Jeremy Bentham, which had its origin in the "greatest happiness" theory and which became the motto of the Utilitarian Movement. (See Collier's *Encyclopedia*, 1967, Vol. 4, p. 61, col. 1; Vol. 23, p. 19, col. 2.)

> *judges to what we must perceive as men. This need is all the greater in fields where the law is in a stage of transition and readjustment* (citing case)." (Emphasis supplied.)

Likewise, in the case of *Gompers* v. *United States,* 233 U.S. 604 (1914), at 610, Mr. Justice Holmes gave voice to the same proposition when he wrote:

> " . . . [T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. *Robertson* v. *Baldwin,* 165 U.S. 275, 281, 282."

And:

> "When a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part. *Metropolitan Casualty Ins. Co.* v. *Brownell,* 294 U.S. 580, 584 and cases cited; *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152, 153." (See *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450 [1945], *supra,* at 465-66.)

Accord, United States v. *Jin Fuey Moy,* 241 U.S. 394, 401 (1916); *In the Matter of Roosevelt Raceway* v. *Monaghan,* 9 N Y 2d 293, 303 (1961), *cert. denied,* 368 U.S. 12 (1961); *I.L.F.Y. Co.* v. *State Housing Rent Commission,* 10 N Y 2d 263, 269 (1961), *appeal dismissed,* 369 U.S. 795 (1962).

That the anonymous literature disseminated by the appellant in the earlier case of *People* v. *Zwickler,* 16 NY 2d 1069 (1965), *supra,* involved only a small segment of the

population of Brooklyn, New York, is no less reason to afford him any greater right to claim that his privilege of free speech is inalienable. Our Nation, which is one large government, is dependent upon the workings of the well-run machinery of many "governments" strategically operating throughout the length and breadth of the United States. Good government, and the assurance of an everlasting democratic form of rule, require that these many "governments," within the one large government, the Nation, be free from confusion and ineffectual operation. Such chaotic consequences can be thwarted by a statute which prevents the possibility of anonymously-presented irresponsible views, with regard to election matters, to be passed off as genuine or worthy, and thereby mislead the voters into conduct which may prove disadvantageous to the body politic.

It is significant, however, that the appellant is seeking to enforce his First Amendment rights to "subsequent election campaigns or in connection with *any* election of party officials, nominations for public office and party position that may occur" at any time. (Amended Complaint, para. "FOURTEENTH"—[R. 3] [emphasis supplied].) The inference is justified that he intends to reach a larger audience. That being so, the danger becomes magnified. That anonymous literature in election matters may be aimed at creating better government does not warrant condoning such anonymity as a necessary concomitant of free expression within the matters encompassed in the disputed statute. What may be a better form of government lies in the realm of conjecture and philosophy, and may be predicated upon a view not popular with the majority. The legislation properly attempts to destroy the maze of in-

decision in the minds of the voters in the face of such anonymous material, as well as to strike back at unfair "hit-and-run" character assassination which may personally offend the target of the writings. It is noteworthy that there is a likelihood that anonymous material, "whether in favor of or against," may have as its principal target the electorate at large, in the quest for delusion—a quest which may have disastrous consequences for the form of government as ours which is designed to secure to each and everyone of us the inalienable rights enshrined in the Bill of Rights.

Further, the appellant is not being deprived from participating in election affairs by the operation of the statute. Rather, it is he, who by his very act of encouraging anonymity, has effectively foreclosed and isolated another, the printer, and other persons responsible for the leaflet, from any true participation in such matters simply because he, as the distributor, has prevented others from debating with the unknown author. This anonymity is as conducive to true participation in election affairs as is the possibility of gregarious behavior to be displayed by Alexandre Dumas' hero, the Count of Monte Cristo, while incarcerated in the Château D'If,* except, of course, that the only real difference is that the present appellant seeks to encourage the *sought-after* anonymity of the person or persons responsible, which he intends to perpetuate by his desire to distribute a similar type of leaflet in the future (R. 5-6) (Amended Complaint, para. "FOURTEENTH"—[R. 3]), for which he had been previously prosecuted (*People* v. *Zwickler*, 16 NY 2d 1069 [1965] *supra*), and which leaflet

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* See Collier's *Encyclopedia*, 1967, Vol. 8, p. 418, col. 2; p. 419, col. 1 (Alexandre Dumas *pere*).

contained, primarily, statements extracted from the Congressional Record, with some comments by the anonymous writer, and very likely not at all actionable as libellous. It is reasonable to contend that the appellant's participation in election affairs would be better enhanced by not assisting and encouraging anonymity, since true participation is predicated upon an exchange of ideas, as well as in argumentative discussion, which anonymity prevents.

Notwithstanding the primary aim of the statute, as aforesaid, to protect the public, a state should also concern itself with the possibility that an individual may be anonymously libelled in election matters. If courts can seek to protect accused persons from anonymous informers, then certainly the same protection ought to be accorded persons who are the unfortunate targets of the mysterious libeller, whose aim it may be to "unseat the public servant or even topple an administration." (See *Garrison* v. *Louisiana,* 379 U.S. 64, 75 [1956] *supra.*)

Appellant's reliance upon *Thomas* v. *Collins,* 323 U.S. 516 (1945), is misplaced. (Brief for Appellant, pp.6, 11-13.) A person who speaks in public and is unidentified is unlike the anonymous person who prints, publishes, or reproduces the material set forth in Section 781-b of the Penal Law of the State of New York, *supra.* The former, by his very presence, lends himself open to inquiry from the listeners and, thus, offers them the opportunity of having his sincerity appraised. His identity, also, is, in a sense, not completely obscured because he is in view, albeit his name is withheld. In the violation of the instant statute, however, the opportunities of appraisal and inquiry are not at all available. It is true that the one who distributes anonymous political and election literature is also physically present,

but he may be a mere truckler, seeking to curry favor with the author, and, perhaps, not even acquainted with the nature of the contents so as to be intelligently questioned about the material. He may also be one possibly duped by the printed material so that in relying upon the value of it, may pass on an unwarranted confidence in it to others, who might not have considered the material worthy were the author's identity disclosed to them. *Thomas, supra,* therefore, does not pose any real danger to the exercise of the elective franchise. Appellant casts little value on the name of the utterer. (Brief for Appellant, p. 13.)* "Truth rests on its own supports for acceptance," advances the appellant (Brief for Appellant, p. 13), but the known originator of the written word is the best key for determining the truth. Truth or falsity is more easily recognized when the public knows the source of the statements. Otherwise, the natural human failing of gullibility found in the untrained comes into play. Inquiry sounds out the merits of the disseminated information when the source is known. It cannot be denied that intelligent selection of political views during elections would assure sounder government. Disturbances in socially and economically-disadvantaged areas have been frequently preceded by unreliable and baseless anonymous communications. It would not be unreasonable to say that many persons in our society are inclined to accept statements in a non-discriminatory fashion and without too much analysis, a danger which would be greater when information on election matters is permitted to reach

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* Any contention that the statute requires *a* name and that "a false name creates as much of a nuisance of (*sic*) attempted detection as does the complete absence of a name" (Brief for Appellant, p. 16), is meaningless. The statute obviously refers to true names and addresses, or its aim would be defeated.

the marketplace of ideas from an anonymous source. Disclosure, therefore, becomes a necessity if we are to be assured of fruitful elections. How can the public recognize the truth readily if the person responsible for the statement concerning election matter is cloaked in a veil of secrecy?

The appellant seeks to distribute that type of anonymous political literature proscribed by the statute without a chance for anyone to challenge the views of the accuser responsible for them so that the public can learn the truth and be enabled to cast its votes for a proper candidate. If an accuser is cloaked in darkness, there can be no one to challenge, and if there is no challenge there will be no way for the public to learn the actual facts, and where the truth rests. It is evident that such a state of affairs must surely result in a lack of confidence in, and a disenchantment with, the candidate, as well as government activities, should the person written about disparagingly chance to be elected. On the other hand, should the anonymous writings covered by the statute presently under review unduly "'puff'' the merits of a candidate, the electorate may easily be deluded, with the same possible bad effect. These arguments, it is respectfully submitted, are equally applicable to "any handbill . . . which contains any statement, . . ., concerning any political party, . . . committee, . . ., proposition or amendment to the state constitution, whether in favor of or against . . ., in connection with any election of public officers, party officials, candidates for nomination for public office, party position, proposition or amendment to the state constitution . . . ", all within the ambit of Section 781-b of the Penal Law, *supra*. Nor are such arguments weakened because one may be able to independently check out the truth or falsity of the *anonymous* statement. It is

hardly likely that the average citizen would attempt to do such investigating on the eve of the election. Then again, it would not be unrealistic or uncharitable to contend that gullibility, previously alluded to, which results in the attendant reliance upon unchecked-out statements, is, rather, a deterrent to investigation. The anonymous statement which suddenly appears on the night of the election is more apt to be "swallowed" because of its sudden impact at a time when it is most difficult to undertake verification, if the latter be actually desired. To rely solely upon sanctions against fraud and "palming-off" (Brief for Appellant, p. 16), may not only fail to prevent the bad effect upon the electorate, but may prove futile in the face of such conduct behind the cloak of anonymity. To permit the anonymous acts now proscribed by the instant statute would give no practical meaning to any suggested sanctions because there would be no person to punish. However, to apply significance to the statute, as intended, and thereby uphold it, would, in an important measure, discourage such fraud and "palming-off." Thus, disclosure is more apt to dispirit delusion of any part of the public in election matters. In a narrower sense, if the anonymously-conceived material is libellous in nature, the person injured ought not to be faced with the additional burden of "hunting" for the wrongdoer, for even if he were able to vindidate himself, a scar must necessarily remain as a haunting memory unless he is able to bring the libeller to task. "Defamation . . . does not only serve to build and unify an anti-democratic group. It is likely to weaken those who are attacked." (See Riesman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 Col. L. Rev. 1085, 1089 [1942]; see also,

Noel, *Defamation of Public Officers and Candidates,* 49 Col. L. Rev. 875 [1949].)*

Any reference to the Federalist papers of Hamilton, Jay and Madison would not be in point. These writings which make up classic commentaries on American constitutional law and on principles of Government generally were written between October, 1787 and April, 1788, and appeared in the New York *Independent Journal.* The writings advocated centralization of our Government, and were in defense of the newly-conceived Federal Constitution. It is significant that none of these writings were vitriolic or slanderous, nor were they intended as *ad hominem* attacks. They were learned treatises which were designed to be constructive in purpose and to expound the theory that a strong centralized form of government was best suited for the infant Nation.

Since there would have been no danger of criminal or civil proceedings against the writers of these famous papers for personal invective, anonymity with regard to these writings was not really necessary, and were undertaken in such manner for another reason, probably to avoid any attacks on life or limb. Of course, the desire of Hamilton, Jay and Madison to promulgate the ideas contained in the *Federalist* papers without prejudgment and unfair criticism by their opponents, had their names been prematurely disclosed as the writers, could, no doubt, have also motivated the anonymity. Then again, writing anonymously during that period was "according to the fashion of the times" (Collier's *Encyclopedia,* 1967, Vol. 11, p. 609, col. 1).

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* To appreciate the effect of libel and unfair criticism, whether open or furtive, upon one of our greatest Americans, Thomas Jefferson, see Collier's *Encyclopedia,* 1967, Vol. 13, p. 530, cols. 1, 2.

In the instant case, however, the appellant has not disclosed the need for distributing anonymous leaflets, the contents of which, it is reiterated, do not even appear to be actionable as libellous.

In addition, we are not now directly concerned with the printer of the material, and any consideration of the historic case of Peter Zenger* and the right of a free press,** since we are not faced with a factual situation involving a defendant charged with printing anonymous political literature, per se. The appellant is one whose wish it is to knowingly distribute anonymous election material (Amended Complaint, para. "FOURTEENTH"—[R. 3]), and it is this distribution, the most danegrous link in the chain of possible harmful reaction on the electorate, with which we are most concerned. Without the distribution, the printing is inconsequential and meaningless since it can have no effect on a public that does not come in contact with it. It is certain that the printer of the material set forth in the statute clearly assumes the garb of culpability the moment he places such material in the hands of the distributor without complying with the requirements of the law.

Even though it is apparent that the purpose of the statute is to safeguard a proper state interest, the protection of its

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* See Collier's *Encyclopedia*, 1967, Vol. 23, p. 752, cols. 1, 2.

** Freedom of the press is not an absolute right. See *Giragi* v. *United States*, 301 U.S. 670, wherein the appeal was dismissed for want of a substantial Federal question. In *Giragi*, 48 Ariz. 33, 58 P. 2d 1249, 64 P. 2d 819, the Superior Court of Maricopa County, Arizona, held that the imposition for revenue of an annual privilege tax on various kinds of business which, in the case of newspapers, is an amount equal to one percent of the gross proceeds received from their publication, is not violative of the due process clause of the Fourteenth Amendment as an abridgement of freedom of the press.

voters from the influences of possible false and misleading information in election and political matters, *secretly-conveyed,* there is no intention, whatever, to censor the language or idea itself, or even to compel silence, since the writer is free to impart such written communications provided he discloses his identity, and the material does not otherwise offend the law (see, e.g., *New York Times* v. *Sullivan,* 376 U.S. 254 [1964], *supra; Garrison* v. *Louisiana,* 379 U.S. 64 [1964], *supra*). Thus, there is also "open and available" to the appellant a channel of communication other than by the anonymity he seeks to participate in, and by which he can express himself.

See *Kovacs* v. *Cooper,* 336 U.S. 77, 89 (1949); compare, *Bakery Drivers Local* v. *Wohl,* 315 U.S. 769, 775 (1942); see also, *People* v. *Street,* 19 N Y 2d 231, 235 (1967).

Since careful analysis of the leaflet referred to herein (R. 5-6) fails to reveal its quality as literary property so as to bring the act of plagiarism into consideration, and since its contents do not appear to be actionable at law as libellous (the latter view being shared by appellant's counsel [Brief for Appellant, pp. 17-18]; *New York Times* v. *Sullivan, supra, Garrison* v. *Louisiana, supra* and *Time, Inc.* v. *Hill,* 385 U.S. 374 [1966]), the appellant has the alternative of complying with the instant statute in the manner set forth therein, even to the extent of assuming the authorship of a similar view. In the light of the foregoing, can it not be reasonably said that if the appellant has been "chilled in the exercise of his rights,"* it is he who must shoulder the blame for that since he could have pursued a more acceptable channel of communicating his opinions, and without *in terrorem* considerations.

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*. See Brief for Appellant, p. 22.

The cases relied upon by the appellant are inapposite since the persons affected therein were faced with the serious impugnment of their constitutional rights, and, unlike the appellant herein, were not afforded any alternative by which their basic rights could substantially be exercised. Thus, in *Baggett* v. *Bullitt*, 377 U.S. 360 (1964) *supra*, which involved the taking of oaths by teachers, said oaths designed to combat subversive conduct, Mr. Justice White stated as follows:

> "Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law. Nor should we encourage the casual taking of oaths by *upholding the discharge or exclusion from public employment* of those with a conscientious and scrupulous regard for such undertakings [engaging in criticism in its broadest sense and on varied subjects]" (*Id.* at 373-4; emphasis supplied.)

The appellants, approximately 64 in number, in *Baggett, supra*, were not in a position to determine the nature of the oaths the two statutes of the State of Washington were intended to encompass, and as Mr. Justice White aptly queried, "[I]f the oaths do not reach some or any of the behavior suggested, what specific conduct do the oaths cover? Where does fanciful possibility end and intended coverage begin?" (*Id.* at 373.) Thus, the appellants were faced with the serious danger of successful perjury prosecution by the mere signing of a vague oath. "The hazard of being prosecuted for knowing but guiltless behavior . . . remains." (*Id.* at 373.)

Likewise, in *Keyishian* v. *Board of Regents, supra*, 385 U.S. 589 (1967), a requirement that teachers sign certifi-

cates intended to prevent the appointment or retention of subversive persons in state employment was also struck down for substantially the same reasons as in *Baggett, supra,* with Mr. Justice Brennan noting the existence of a "highly efficient *in terrorem* mechanism" (385 U.S., *supra,* at 601), and adding:

> "When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone . . .' *Spieser* v. *Randall,* 357 U.S. 513, 526." (385 U.S., *supra,* at 604.)

Significantly, Mr. Justice Brennan, in evaluating the danger inherent in the requirements faced by the teachers in *Keyishian, supra,* relied upon the language pronounced in *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250 (1957), that:

> "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." (385 U.S., *supra,* at 603.)

In *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965), relied upon by the appellant (Brief of Appellant, p. 9), the factual situation depicted cast upon the recipient of mailed material an onus and taint which he could not possibly avoid except by total surrender of the opportunity to absorb all ideas that could be gleaned from the receipt of mailed material, even though that material might contain matter which the addressee would probably never adopt as a guide to thought and behavior, because of its possible subversiveness. In short, the right to learn by reading was in danger

of impairment. As Mr. Justice Douglas stated in the majority opinion in *Lamont, supra*:

> "We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. *Their livelihood may be dependent on a security clearance. Public officials, like schoolteachers who have no tenure,* might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.' The regime of this Act is at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270." (*Id.* at 307; emphasis supplied.)

The appellant herein is in no wise faced with such a "highly efficient *in terrorem* mechanism" (*Keyishian* v. *Board of Regents,* 385 U.S. 589, 601 [1967], *supra*), and has other means of imparting the information contained in the leaflet, which we reiterate, does not even appear to be actionable at law, criminally or civilly, as libellous matter (R. 5-6), without reason to fear complying with the requirements of Section 781-b of the Penal Law of the State of New York, *supra.* In any event, the public interest in good government and proper elections requires the neces-

sity of such a statute. Again, there was no showing in *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965), *supra,* that the *only* persons receiving the subversive mail were themselves subversive, which may very well have dictated a "public interest" approach.

Likewise, the other cases cited by the appellant which purport to cast some favorable light upon the claim that he is being unreasonably deprived of a constitutional right, are equally inapplicable. Therefore, it would serve no useful purpose to offer any analysis of them.

In recent years, courts have outlawed particular modes of expressing ideas, which ideas would probably not have been interfered with had they been disseminated in a more acceptable fashion. (See *Kovacs* v. *Cooper,* 336 U.S. 77 [1949], *supra* [sound truck];* *Adderley* v. *Florida,* 385 U.S. 39 [1966], *supra* [trespass]; *United States* v. *Miller,* 367 F. 2d 72 [2d Cir. 1966], *cert. denied,* 386 U.S. 911 [1967], *supra* [destruction of draft card]; compare, *O'Brien* v. *United States,* 376 F. 2d 538 [1st Cir. 1967], *supra*; *People* v. *Stover,* 12 NY 2d 462 [1963], *appeal dismissed,* 375 U.S. 42 [1963] [symbolic expression "offending sensibilities"]; *People* v. *Martin,* 15 NY 2d 933 [1965], *cert. denied,* 382 U.S. 828 [1965] [sit-in]; *People* v. *Penn,* 16 NY 2d 581 [1965], *cert. denied,* 383 U.S. 969 [1966] [picketing]; *People* v. *Street,* 19 NY 2d 231 [1967], *supra* [flag-desecration by burning].)

In conclusion, it must be stated that it is incredible that any advocate of freedom of expression should contend that

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* In *Kovacs, supra,* the cherished principle of freedom of speech was required to yield to the "comfort and convenience" of the citizenry.

the present statute is unconstitutional because it demands disclosure, for is not anonymity predicated on the very absence of such freedom! It is only in a free world, as distinguished from a totalitarian one, that the individual is free to speak and write his thoughts without the need of unavowed authorship. Anonymity is more often the handmaiden of fear since it reveals "shackled" expression which, in the instant case, the appellant now seeks to perpetuate by his claim that he has an inalienable right to circulate anonymous election material in violation of a sound and salutary enactment. In doing this, he seeks to assist the writer of the leaflet (R. 5-6), who is bent on avoiding responsibility, to influence the electorate into acting in a manner which could very well have a debilitating effect upon the elective franchise, with consequent dire results upon society. We are faced with such a danger if we permit the Constitution to be utilized as a convenient vehicle with which to inundate the public with anonymous political and election literature, deceptive or excoriating in nature, within the prohibition of the instant statute. Vital, indeed, is the sentiment voiced many years ago by Felix Frankfurter (then Professor Frankfurter) and Thomas G. Corcoran, when they wrote:

> ". . . American social policy suffers all too much from the dictation of abstract questions of constitutional power. . . ." (See Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917, 982 [1926].)

CONCLUSION

In view of the above, therefore, it is the respectful submission of *Amicus Curiae* that the order dismissing the amended complaint be affirmed in all respects.

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Respectfully submitted,

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